

Hon. Joseph Welty, Chair
Task Force on Rule 32, Ariz. R. Crim. P., Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32;) Supreme Court No. R-19-0012
TO ADOPT A NEW RULE 33;)
TO AMEND VARIOUS RULE 41) SUPPLEMENTAL PETITION
FORMS AND TO ADOPT NEW)
FORMS; TO RENUMBER) <u>Expedited Consideration and</u>
RULE 33, ARIZONA RULES OF) <u>Emergency Adoption Requested</u>
CRIMINAL PROCEDURE; AND)
TO ADOPT A CONFORMING)
CHANGE TO RULE 17.1(e),)
ARIZONA RULES OF CRIMINAL)
PROCEDURE)
_____)

Petitioner is the chair of the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (“Task Force”).¹ Pursuant to Supreme Court Rule 28(h), Petitioner requests the Court’s expedited consideration and emergency adoption of the amendments proposed by this supplemental petition.

¹ Administrative Order No. 2018-07, which established the Task Force, provides that the members’ terms do not expire until December 31, 2019. Petitioner according files this supplemental petition under the authority of that A.O.

1. Background. The petition filed by the Rule 32 Task Force, and an amended petition and a reply filed after two successive public comment periods, demonstrate that R-19-0012 covered a multitude of issues concerning post-conviction proceedings. By an August 29, 2019 Order, the Court adopted the Task Force’s proposed changes to the criminal rules and forms. These comprehensive changes will become effective on January 1, 2020.

The Task Force worked diligently to assure that its proposed rule changes were internally consistent and correct. But while reviewing the rules in preparation for an educational program, Petitioner determined that one provision might have missed that mark.

2. The issue regarding preclusion under Rule 32.2. The issue at hand concerns preclusion. Preclusion is a significant concept in the law concerning post-conviction relief. The essence of the concept is that a claim is precluded, i.e., barred, if, under new Rule 32, (1) the claim still may be raised on appeal or in a post-trial motion, (2) the claim was previously adjudicated on the merits in an appeal or in any prior post-conviction (“PCR”) proceeding, or (3) the claim was waived by a failure to raise the claim at trial, on appeal, or in a prior proceeding. The doctrine of preclusion reinforces the notion of finality.

However, there are exceptions to the preclusion doctrine. Current Rule 32.2 exempts from the preclusion doctrine claims that are raised under Rule 32.1(d)

through (h). New Rule 32.2 also exempts from preclusion any claims raised under Rules 32.1(d) through (h), and additionally, claims raised under Rule 32.1(b) (a lack of subject matter jurisdiction) and Rule 32.1(c) (the sentence as imposed was not authorized by law). New Rule 32.2 only exempts (b) through (h) claims from preclusion if they were waived by failing to raise them in a previous proceeding. The issue presented by this supplemental petition is that the new rule does not explicitly preclude a claim under Rule 32.1(b) through (h) if the claim was previously raised and adjudicated on the merits in an appeal or in a previous post-conviction proceeding.

Rule 32.2 as adopted provides (underline added),

Rule 32.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:

- (1) still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or
- (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3). However, when a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive or untimely postconviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss

the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

Rule 32.2(a) by its express language only applies to “(a)” claims under Rule 32.1 (see the underline in the Rule 32.2(a) above). A claim under Rule 32.1(a) is based on the contention the defendant’s conviction was obtained, or the sentence was imposed, in violation of the U.S. or Arizona constitutions. Because Rule 32.2(a) only applies to “(a)” claims, it does not apply to (b) through (h) claims, except as provided in Rule 32.2(b).

The first sentence of Rule 32.2(b) states that (b) through (h) claims are not subject to preclusion under 32.2(a)(3), that is, if they were waived by a failure to raise them. However, the first sentence of Rule 32.2(b) is the only directive in Rule 32.2 on how to apply preclusion to (b) through (h) claims. Rule 32.2(b) says nothing about precluding claims under (b) through (h) that were finally adjudicated on the merits in an appeal or in any previous PCR proceeding. Yet the Task Force did not intend to allow a defendant to raise a successive (b) through (h) claim that was previously adjudicated on the merits.

Petitioner acknowledges that Rule 32.2(b) says, “At any time, a court may determine by a preponderance of the evidence that an issue is precluded....” But this begs the question: what is the rule authority for precluding the claim? Petitioner submits that there is nothing in the new rule that does this. Petitioner supposes that the court could preclude the claim based on *res judicata*, but the court should not be

required to refer to a legal concept that is not expressly contained in Rule 32. The rule itself should preclude the claim.

3. The issue regarding preclusion under Rule 33.2. Whereas Rule 32 provides a process for post-conviction relief for a defendant who was found guilty after a trial or who was found after a hearing to have violated a term of probation, Rule 33 applies to a defendant who entered a guilty plea or admitted a probation violation. Rules 32 and 33 are similarly organized, but they have different content. Rule 33.2 provides,

Rule 33.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 33.1(a) based on any ground:

- (1) waived by pleading guilty or no contest to the offense;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded.

(1) **Generally.** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a)(3). However, when a defendant raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

(2) **Ineffective Assistance of Post-Conviction Counsel.** A defendant is not precluded from filing a timely second notice requesting post-conviction relief

claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.

Rule 33.2(b) has the same inherent defect as Rule 32.2(b): it does not expressly preclude claims finally adjudicated on the merits in a previous PCR proceeding. Rule 32.2(b) and Rule 33.2(b) both require additional and unequivocal text to confirm that (b) through (h) claims previously adjudicated on the merits on appeal or in a prior post-conviction proceeding are precluded.

4. The Task Force previously identified this issue but did not correctly address it. The Task Force’s January 2019 amended petition stated at pages 6-7:

Rule 32.2 (‘preclusion of remedy’): The proposed language in the January version of Rule 32.2(b) [‘claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion...’] is inaccurate because it does not subject (b) through (h) claims to the effect of preclusion if, for example, a (b) through (h) claim was previously adjudicated on appeal. To correct this, members agreed to add ‘(3)’ to the first sentence of Rule 32.2(b) so it reads, ‘claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3).’ With this modification, (b) through (h) claims would be subject to preclusion under Rule 32.2(a)(1) (i.e., still raiseable on appeal or in a post-trial motion) and under Rule 32.2(a)(2) (previously adjudicated on the merits).

But in retrospect, that last sentence appears to have been an incorrect conclusion. With the modification proposed above, which the Court included in the version of the rules as adopted, the Task Force intended to preclude previously adjudicated claims. However, without any reference to 32.2(a)(2), the express language of Rule 32.2(b) simply does not fulfill that objective.

5. Is there a need to address preclusion of (b) through (h) claims under Rules 32.1(a)(1) and 33.2(a)(1)? At this point, Petitioner is not certain that the rule on preclusion should apply to (b) through (h) claims “still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24” (see Rule 32.2(a)(1)); or that preclusion should apply to (b) through (h) claims “waived by pleading guilty or no contest to the offense” (see Rule 33.2(a)(1)). For claims under Rule 32.1(b) through (h), a post-conviction proceeding might provide a defendant a speedier remedy than would otherwise be available on an appeal, even if the claim is still raiseable on appeal. And for claims under Rule 33.1(b) through (h), grounds for a (b) through (h) claim might not even exist when the defendant entered a guilty plea. The better course probably is to allow judges to decide whether the circumstance of individual claims warrants preclusion under subpart (a)(1) of these respective rules.

Accordingly, Petitioner is requesting a modification to Rules 32.2(b) and 33.2(b) clarifying that (b) through (h) claims previously adjudicated on the merits on appeal or in any previous post-conviction proceeding are precluded.

5. Conclusion. Petitioner is filing this supplemental petition before the January 1, 2020 effective date of the R-19-0012 rule amendments with the hope that the Court will adopt the modifications proposed herein so the amendments become effective concurrently with the other previously adopted provisions. Petitioner recognizes that this supplemental petition has not been adequately vetted. However,

the issue has only recently come to light, and three judges who served on the Task Force (two from the Court of Appeals and one superior court judge) support the supplemental petition. The supplemental petition also was provided to other Task Force members, who had no objections within the limited time available for review.

Petitioner therefore requests the following:

(a) That the Court consider this supplemental petition at its December 2019 rules agenda;

(b) That the Court adopt the amendments to Rules 32.2(b) and 33.2(b), as shown in the Appendix, on an emergency basis and effective January 1, 2020; and

(c) That the supplemental petition be opened for public comments pending the Court's further consideration of this supplement sometime during 2020.

RESPECTFULLY SUBMITTED this 12th day of November 2019.

By /s/ _____
Hon. Joseph Welty, Chair

Appendix

Text added to Rules 32.2 and 33.2 is shown by underline.

Rule 32.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:

- (1) still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or
- (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3), but they are subject to preclusion under Rule 32.2(a)(2). However, when a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive or untimely postconviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

Rule 33.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 33.1(a) based on any ground:

- (1) waived by pleading guilty or no contest to the offense;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded.

(1) Generally. Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a)(3), but they are subject to preclusion under Rule

33.2(a)(2). However, when a defendant raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

(2) *Ineffective Assistance of Post-Conviction Counsel.* A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.